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### Social Networking and Judicial Ethics.

Craig Estlinbaum

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# ESSAY

*Craig Estlinbaum*

## Social Networking and Judicial Ethics

**Abstract.** Social network sites (SNSs) such as Facebook, LinkedIn, and Twitter have become an increasingly ever-present feature in American life since first appearing in the late 1990s. SNSs now impact virtually all parts of daily life, and the judiciary is not immune to this effect. Recent statistics show that approximately 40% of judges nationwide utilize SNSs for personal, professional, and electoral purposes.

Social media, like any public communication form, presents special ethical challenges for judges. In recent years, judicial ethics committees in various states have weighed in on these questions and have not shown any clear consensus. However, it is generally agreed that judges using SNSs must pay particular attention to how that use relates to the judge's particular ethical obligations regarding relationships and communication with others. In general terms, social media participation by judges raises important ethical questions that directly impact how courts are perceived in the emerging media age.

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## ESSAY CONTENTS

I. Introduction.....	4
II. Making Acquaintances: Judicial Ethics of Networking .....	7
A. Facebook Foundations .....	7
B. SNSs and the Model Code of Judicial Conduct. . .	9
C. Judicial Misbehavior Through SNSs .....	12
D. The Permissive and Restrictive Approaches .....	15
1. The Permissive Approach to SNSs .....	15
2. The Restrictive Approach to SNSs .....	17
3. Specific Limitations and Exceptions to SNSs .....	18
III. Suggestions for the Ethical Judge Online .....	21
A. Public Confidence in the Judiciary .....	21
B. Allowing SNS Use with Caution .....	23
C. Alternative Uses Within the Permissive Approach .....	25
IV. Conclusion.....	27

## I. INTRODUCTION

Historians will likely mark the first decade of the twenty-first century as the dawn of the Social Media Age.<sup>1</sup> Memberships on social network sites (“SNSs”) like Facebook,<sup>2</sup> Twitter,<sup>3</sup> Google+,<sup>4</sup> YouTube,<sup>5</sup> and LinkedIn<sup>6</sup> increased exponentially each year since their humble beginnings, rooted in

1. See Carolyn Elefant, *The “Power” of Social Media: Legal Issues & Best Practices for Utilities Engaging Social Media*, 32 ENERGY L.J. 1, 4 (2011) (defining social media as “a catch phrase that describes technology that facilitates interactive information, user-created content[,] and collaboration” (citing *Core Characteristic of Web 2.0 Services*, TECHPLUTO, <http://www.techpluto.com/web-20-services/> (last visited Apr. 11, 2012))); see also James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1142 (2009) (defining social network sites as “web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system[;] (2) articulate a list of other users with whom they share a connection[;] and (3) view and traverse their list of connections and those made by others within the system.” (quoting danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 11, para. 4 (2007), available at <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html>)).

2. Eric Eldon, *Facebook Sees Big Traffic Drops in US and Canada As It Nears 700 Million Users Worldwide*, INSIDE FACEBOOK (June 15, 2011), <http://www.insidefacebook.com/2011/06/12/facebook-sees-big-traffic-drops-in-us-and-canada-as-it-nears-700-million-users-worldwide/> (estimating that Facebook reportedly boasts 149 million users in the United States alone). Facebook is an SNS that allows users to connect online with others in the Facebook community by inviting and adding friends, exchanging messages, maintaining and updating a personal profile, and joining common-interest user groups. James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1144–49 (2009). See generally FACEBOOK, <http://www.facebook.com/principles.php> (last visited Apr. 11, 2012) (discussing the goals and utility of Facebook).

3. See Phillip Gragg & Christine L. Sellers, *Twitter*, 102 LAW LIBR. J. 325, 325 (2010) (depicting Twitter as a microblogging service that allows users to send tweets—messages limited to 140 characters—to followers and web users (citing *About Twitter*, TWITTER, <http://twitter.com/about> (last visited Apr. 11, 2012))). See generally TWITTER, <http://twitter.com/about> (last visited Apr. 11, 2012) (explaining the information network to potential users).

4. See Claire Cain Miller, *Another Try by Google to Take on Facebook*, N.Y. TIMES, June 28, 2011, [http://www.nytimes.com/2011/06/29/technology/29google.html?\\_r=2](http://www.nytimes.com/2011/06/29/technology/29google.html?_r=2) (introducing Google+ as an SNS and identity service operated by search engine giant Google Inc. launched on June 28, 2011, for an invitation-only field-testing phase). By the end of 2011, it was reported that Google+ surpassed an estimated user base of 62 million. Jill Duffy, *Google+ Users Estimated at 62 Million*, PCMAG (Dec. 28, 2011, 10:53 AM), <http://www.pcmag.com/article2/0,2817,2398114,00.asp>.

5. See *About YouTube*, YOUTUBE, [http://www.youtube.com/t/about\\_youtube](http://www.youtube.com/t/about_youtube) (last visited Apr. 11, 2012) (explaining YouTube as an online video sharing Internet service that “provides a forum for people to connect, inform, and inspire others across the globe and acts as a distribution platform for original content”). YouTube estimates it has 800 million different user visits each month; however, this number may be much higher. *Statistics*, YOUTUBE [http://www.youtube.com/t/press\\_statistics](http://www.youtube.com/t/press_statistics) (last visited Apr. 11, 2012).

6. Debra L. Bruce, *Social Media 101 for Lawyers*, 73 TEX. B.J. 186, 186 (2010) (depicting LinkedIn as a networking site geared towards professionals that allows members to connect with other professionals). See generally *About Us*, LINKEDIN, <http://press.linkedin.com/about> (last visited Apr. 11, 2012) (providing a general overview of the LinkedIn service). As of February 9, 2012, LinkedIn reported having over 150 million users worldwide, nearly 60% of whom are located outside the United States. *Id.*

the late 1990s.<sup>7</sup> Recently, the Pew Research Center reported that 65% of adult Internet users use social media websites, whereas in 2008 that number stood at only 29%.<sup>8</sup> Social network use transcends normal social and economic boundaries, crossing age, racial, educational, and geographic lines.<sup>9</sup> Social media is also catching on among older Americans. In 2009, only 13% of Internet users age sixty-five or older used social media, yet by 2011, that number grew to 33%.<sup>10</sup> Not surprisingly, judges are using SNSs too. A recent study by the Conference of Court Public Information Officers showed that 40% of responding state court judges use SNSs.<sup>11</sup> That same study, however, showed that almost half of the judges surveyed “disagreed . . . with the statement ‘Judges can use social media profile sites, such as Facebook, in their professional lives without compromising professional conduct codes of ethics.’”<sup>12</sup> This conflict between the desire to use a popular technological communication tool and judicial ethics restrictions is cause for judges and the wider legal community to closely re-examine judicial codes of conduct as they apply to SNSs.<sup>13</sup>

Various state judicial ethics committees’ earliest forays into the arena of judicial SNS usage led to two distinct approaches to the questions of

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7. See danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 11, para. 15 (2007), available at <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html> (identifying SixDegrees.com, launched in 1997, as the first truly recognizable social networking site). SixDegrees.com allowed members to create profiles, identify and list friends, and provided a means to connect and communicate with others. *Id.* paras. 15–16.

8. MARY MADDEN & KATHRYN ZICKUHR, PEW RESEARCH CTR., 65% OF ONLINE ADULTS USE SOCIAL NETWORKING SITES: WOMEN MAINTAIN THEIR FOOTHOLD ON SNS USE AND OLDER AMERICANS ARE STILL COMING ABOARD 2 (2011), available at <http://pewinternet.org/-/media/Files/Reports/2011/PIP-SNS-Update-2011.pdf>.

9. See *id.* at 4 (illustrating the high percentages of online social networking users across a variety of typical demographics).

10. *Id.* at 5–6.

11. CHRISTOPHER J. DAVEY ET AL., NEW MEDIA COMM., CONFERENCE OF COURT PUB. INFO. OFFICERS, NEW MEDIA AND THE COURTS: THE CURRENT STATUS AND A LOOK AT THE FUTURE 8 (2010), available at <http://www.ccpio.org/documents/newmediaproject/New-Media-and-the-Courts-Report.pdf>. The report is based upon a 2010 survey of “individuals in the court community” that returned 810 complete responses and an additional 789 partially complete responses. *Id.* The report defines “new media” in broader terms than the “social networking” definition used herein, to include microblogging, visual media sharing, and Wikis such as Wikipedia and Judgepedia. See *id.* at 7–8 (enumerating several categories of technology that impact the judiciary).

12. *Id.* at 8.

13. See Samuel Vincent Jones, *Judges, Friends, and Facebook: The Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 281, 284–85 (2011) (exploring application of the judicial code of conduct to new social media).

whether and how judges may utilize social media.<sup>14</sup> One commentator defined these approaches as the integrative approach and the restrictive approach.<sup>15</sup> The integrative approach does not specifically restrict SNS use by judges, but it does require that any such use conform to the applicable judicial canons of conduct.<sup>16</sup> The restrictive approach limits a judge's SNS activity by forbidding judges from designating and identifying attorneys and others who may appear before her as a friend because this designation is believed to convey to others the impression that the person befriended is in a special position to influence the judge.<sup>17</sup>

To date, few judicial ethics commissions have expressed an opinion on the matter, and the opinions that do exist provide no clear guidance or consensus.<sup>18</sup> The lack of guidance, however, is not surprising. Social media presents complex challenges for judges and the legal community at large because the personal relationships displayed through social media are often complex and easily misinterpreted. Judges function in a world where they must not only maintain propriety in public, but must also be aware that even innocent conduct may present an appearance of impropriety, warranting disclosure or recusal in a case.<sup>19</sup>

In Part II, this Essay defines social media and social networking and illustrates how a judge's participation in these communities raises potential

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14. See *id.* at 286–90 (introducing the concept of two approaches when addressing the quandary of judges using new media such as Facebook).

15. *Id.* at 288–90.

16. E.g., Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 3 (2010), available at <http://courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf> (noting that the mere designation of a friend online does not “in and of itself[] indicate the degree . . . of a judge’s relationship with the person”); see also Samuel Vincent Jones, *Judges, Friends, and Facebook: The Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 281, 288 (2011) (examining additional states’ ethics opinions that exemplify the integrative approach). The Model Code of Judicial Conduct was introduced in 1972 and was revised in 2007. J. MICHAEL GOODSON LAW LIBRARY, DUKE UNIV. SCH. OF LAW, RESEARCH GUIDES: LEGAL ETHICS 6 (2011), available at <http://www.law.duke.edu/lib/researchguides/pdf/legalethics.pdf>. “[E]ach state adopts its own rules for judicial conduct, and most are based on this model.” *Id.*

17. E.g., Fla. Judicial Ethics Advisory Comm., Op. No. 2009-20, paras. 3–4 (2009), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html> (disallowing judges and attorneys to be friends on SNSs).

18. Compare Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 5 (2010), available at <http://courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf>, (allowing judges, attorneys, and other court personnel to be friends on social media sites), with Fla. Judicial Ethics Advisory Comm., Op. No. 2009-20, paras. 3–4 (2009), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html> (deciding that judges and attorneys are not allowed to be friends on SNSs).

19. See generally MODEL CODE OF JUDICIAL CONDUCT R. 2.4 (2007) (requiring judges to exemplify and maintain the impression of neutral decision-makers free from outside influence); *id.* R. 2.11 (providing a list of potential situations that could result in disqualification).

ethics questions. Part III surveys the decisions released by judicial ethics committees to date and seeks to understand how those committees have applied the applicable rules to the social media questions presented. Finally, Part IV draws conclusions and suggests methods where the judicial use of SNSs might conform to ethical obligations while promoting public confidence in the judiciary.

## II. MAKING ACQUAINTANCES: JUDICIAL ETHICS OF ONLINE SOCIAL NETWORKING

### A. Facebook Foundations

The terms “social media,” “social network,” and “social networking” are used interchangeably in this Essay to refer to “web-based services that allow individuals to: (1) construct a public or semi-public profile within a bounded system[;] (2) articulate a list of other users with whom they share a connection[;] and (3) view and traverse their list of connections and those made by others within the system.”<sup>20</sup>

The potential categorization of SNSs is seemingly endless. Indeed, one commentator identified twenty-three social media sub-categories.<sup>21</sup> The New Media Committee, commissioned by the Conference of Court Public Information Officers, identified seven types of “new media technology.”<sup>22</sup> These new media include social media profile sites, such as Facebook;<sup>23</sup> microblogging sites, such as Twitter;<sup>24</sup> smartphones, tablets, and notebooks, such as the iPad and the Blackberry;<sup>25</sup> monitoring and metric

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20. danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 11, para. 4 (2007), available at <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html>.

21. Linda Fulkerson, *23 Types of Social Media Sites*, ON BLOGGING WELL (Feb. 17, 2010), <http://onbloggingwell.com/23-types-of-social-media-sites/>. Such subcategories range from blogs and social networking sites to “content-driven communities” like Wikipedia, and even to sites that defy simple categorization, such as StumbleUpon. *Id.* StumbleUpon is, for lack of a better term, a “channel-surfing” web service that takes users to randomly selected websites based upon user ratings and feedback of each user’s particular interests. *Id.*; accord *What Is StumbleUpon*, STUMBLEUPON, <http://www.stumbleupon.com/about> (last visited Apr. 11, 2012) (“We’ll show you web pages based on that feedback as well as what similar Stumblers and the people you follow have [l]iked or [d]isliked.”).

22. CHRISTOPHER J. DAVEY ET AL., NEW MEDIA COMM., CONFERENCE OF COURT PUB. INFO. OFFICERS, NEW MEDIA AND THE COURTS: THE CURRENT STATUS AND A LOOK AT THE FUTURE 7–8 (2010), available at <http://www.ccpio.org/documents/newmediaproject/New-Media-and-the-Courts-Report.pdf>.

23. *Id.* at 7.

24. *Id.*

25. *Id.* While these devices are not SNSs, they do enable users to remain connected to their assorted online networks virtually all the time via wireless Internet access. *Id.*

sites, such as SocialSeek;<sup>26</sup> news categorizing and sharing sites, such as Digg;<sup>27</sup> visual media sharing, such as YouTube;<sup>28</sup> and online encyclopedias, such as the Wikis.<sup>29</sup>

The most popular form of SNSs are social profile sites, namely Facebook.<sup>30</sup> Facebook allows members to create their own profile page and network within the Facebook community.<sup>31</sup> Members may invite others to become friends and can link their profile to those of their friends, compiling lengthy contact lists.<sup>32</sup> Users may also report their status and location, post public messages, videos, and photographs on friends' profiles, and send private messages to other users.<sup>33</sup> Because Facebook is so widely used, the judicial ethics opinions issued to date centered on Facebook use and even adopted Facebook's nomenclature, including the term "friend," to describe the linking function between users.<sup>34</sup>

26. *Id.* at 8. Sites in this category "aggregate information about Internet traffic patterns and . . . display analyses of how a particular entity is portrayed or understood by the public." *Id.*

27. *Id.* Digg is an Internet web service that allows information sharing by way of ranking news stories and blogs. See generally DIGG, <http://digg.com/> (last visited Apr. 11, 2012) (presenting top-rated news stories).

28. CHRISTOPHER J. DAVEY ET AL., NEW MEDIA COMM., CONFERENCE OF COURT PUB. INFO. OFFICERS, NEW MEDIA AND THE COURTS: THE CURRENT STATUS AND A LOOK AT THE FUTURE 8 (2010), available at <http://www.ccpio.org/documents/newmediaproject/New-Media-and-the-Courts-Report.pdf>.

29. See *id.* (reviewing several websites that allow collaborative information gathering on any given topic, including an online encyclopedia (Wikipedia) and an interactive website providing information on courts and judges (Judgepedia)).

30. See David Weidner, *Please Wait, This Column on the Facebook IPO Is Browsing Its Friends' Updates*, WALL ST. JOURNAL (Feb. 2, 2012), [http://online.wsj.com/article/SB10001424052970203920204577197571408312382.html?mod=fbapp\\_art\\_onwsj](http://online.wsj.com/article/SB10001424052970203920204577197571408312382.html?mod=fbapp_art_onwsj) ("Users spend 800 billion minutes, an average of an hour per user, on the site a month . . ."); see also Jessica Gynn, *Facebook Tops 500 Million Users Worldwide*, L.A. TIMES (July 22, 2010), available at <http://articles.latimes.com/2010/jul/22/business/la-fi-facebook-20100722> (naming Facebook as "[t]he world's most popular social networking site," rapidly growing to boast over 500 million users as of 2010).

31. See *Sharing and Finding You on Facebook: Control Over Your Profile*, FACEBOOK, <http://www.facebook.com/about/privacy/your-info-on-fb#controlprofile> (last visited Apr. 11, 2012) (explaining how to manipulate the internal privacy settings on Facebook to make a particular profile page available to an audience of the user's choosing); see also Matthew J. Hodge, *The Fourth Amendment and Privacy Issues on the "New" Internet: Facebook.com and MySpace.com*, 31 S. ILL. U. L.J. 95, 97 (2006) (detailing multiple privacy functions available on Facebook).

32. *Help Center: Adding Friends & Friend Requests*, FACEBOOK, <http://www.facebook.com/help/friends/requests> (last visited Apr. 11, 2012).

33. Matthew J. Hodge, *The Fourth Amendment and Privacy Issues on the "New" Internet: Facebook.com and MySpace.com*, 31 S. ILL. U. L.J. 95, 97 (2006).

34. See Fla. Judicial Ethics Advisory Comm., Op. No. 2010-05, para. 1 (2010), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-05.html> (stating the issue in controversy as "[w]hether a candidate for judicial office may add lawyers who may appear before the candidate, if elected judge, as 'friends' on a SNS, and permit such lawyers to add the candidate as their 'friend'"); Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 1



Facebook's general features, including the friend feature, are common among SNSs, even if the specific terminology is different.<sup>35</sup>

SNSs offer the benefit of allowing users to communicate staggering amounts of information in real time to millions of people.<sup>36</sup> Reports reveal that about one-half of Facebook's 500 million users worldwide access their Facebook account each day, sending nearly 3 million messages in a twenty-minute period.<sup>37</sup> This volume is representative of only one SNS. In late 2011, Twitter averaged 230 million tweets daily.<sup>38</sup> Similarly, "60 hours of video are uploaded every minute."<sup>39</sup> Virtually every subject imaginable is being discussed at any given moment on SNSs around the world. Thus, the potential for judicial use and misuse of such a tremendous tool is readily apparent.

### B. SNSs and The Model Code of Judicial Conduct

To understand the parameters of SNS usage by the judiciary, certain canons of conduct must be briefly discussed. The primary purpose of the ABA Model Code of Judicial Conduct (Judicial Code) is to maintain the public's confidence in the judiciary.<sup>40</sup> Given the swiftness of SNSs as a

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(2010), available at <http://courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf> ("The Ethics Committee of the Kentucky Judiciary has received an inquiry from a judge as to the propriety of his being a member of Facebook, an Internet-based social networking site, and being 'friends' with various persons who might appear before him in court."); see also Samuel Vincent Jones, *Judges, Friends, and Facebook: The Ethics Prohibition*, 24 GEO. J. LEGAL ETHICS 281, 288–89 (2011) (elaborating upon the various judicial opinions addressing SNSs).

35. *Compare Facebook Principles*, FACEBOOK, <http://www.facebook.com/principles.php> (last visited Apr. 11, 2012) (stating the principles behind friending and community within Facebook), with *About Twitter*, TWITTER, <http://twitter.com/about> (last visited Apr. 11, 2012) (describing how members "follow" communication avenues).

36. Samuel Vincent Jones, *Judges, Friends, and Facebook: The Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 281, 282 nn.5–10 (2011) (describing how SNSs allow people to "cultivate social connections, enhance political campaign marketing, locate people, facilitate romantic interaction/dating, share personal information, and supplement litigation methodologies," all from an assortment of devices in addition to computers).

37. See *Facebook Statistics, Stats & Facts for 2011*, DIGITAL BUZZ BLOG (Jan. 28, 2011), <http://www.digitalbuzzblog.com/facebook-statistics-stats-facts-2011/> (illustrating that in a given twenty-minute period during 2010, 2.716 million Facebook messages were sent); see also Jeff Bullas, *50 Fascinating Facebook Facts and Figures*, JEFFBULLAS.COM, <http://www.jeffbullas.com/2011/04/28/50-fascinating-facebook-facts-and-figures/> (last visited Apr. 11, 2012) (providing comprehensive statistics of Facebook's social media usage).

38. Lauren Dugan, *230 Million Tweets Per Day, 50 Million Daily Users and Other Twitter Stats*, MEDIA BISTRO (Sept. 9, 2011), [http://www.mediabistro.com/alltwitter/230-million-tweets-per-day-50-million-daily-users-and-other-twitter-stats\\_b13518](http://www.mediabistro.com/alltwitter/230-million-tweets-per-day-50-million-daily-users-and-other-twitter-stats_b13518).

39. *Statistics*, YOUTUBE, [http://www.youtube.com/t/press\\_statistics](http://www.youtube.com/t/press_statistics) (last visited Apr. 4, 2012).

40. See Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 951 (1996) (defining the code's objective as maintaining both the appearance and reality of judicial

social phenomenon and the lengthy process of amending the Judicial Code, the pace set by SNSs cannot be matched by the Judicial Code, which has yet to specifically address social media use.<sup>41</sup> Instead, a judge's social media use is analyzed under the same Judicial Code rules that govern a judge's ability to socialize and communicate by any other medium.<sup>42</sup>

Canon 1 requires a judge to "uphold and promote the[] independence, integrity, and impartiality of the judiciary, and [to] avoid impropriety and the appearance of impropriety."<sup>43</sup> The appearance of impropriety standard is violated when a reasonable person would perceive the judge's conduct as violating the "law, court rules[,] or provisions of [the Judicial Code]" or when behavior "reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."<sup>44</sup> The rules under this canon prohibit judges from using the office to obtain "personal advantage or deferential treatment of any kind."<sup>45</sup>

Canon 2 requires judges to perform their duties impartially, competently, and diligently.<sup>46</sup> This canon entails numerous rules, including: (1) the duty to be fair and impartial;<sup>47</sup> (2) the obligation to perform all official "duties[] without bias or prejudice;"<sup>48</sup> (3) the duty to prevent externalities, both public and private, from influencing "the judge's judicial conduct or judgment;"<sup>49</sup> (4) the requirement to accord every litigant "the right to be heard according to law;"<sup>50</sup> (5) the duty to avoid improper ex parte communication;<sup>51</sup> and (6) the duty to avoid

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integrity). The United States Supreme Court has observed that public confidence in the judicial branch of government is essential to its proper functioning. *E.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982) (noting that public confidence in the judiciary erodes in the absence of judicial self-restraint in the exercise of its power).

41. See Samuel Vincent Jones, *Judges, Friends, and Facebook: The Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 281, 284-85 (2011) ("Legal constructions have long struggled to keep pace with . . . technology . . . [which has] 'outpaced' legal ethics rules.").

42. Cf. Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 2010-7, at 2-3 (2010), available at [http://www.sconet.state.oh.us/Boards/BOC/Advisory\\_Opinions/2010/default.asp](http://www.sconet.state.oh.us/Boards/BOC/Advisory_Opinions/2010/default.asp) (follow "Opinion 2010-7" hyperlink; then accept the download prompt) (summarizing existing canons and rules of judicial conduct and concluding that "[u]pholding these required virtues may be challenging for a social networking judge").

43. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007).

44. *Id.* R. 1.2 cmt. 5.

45. *Id.* R. 1.3 cmt. 1.

46. *Id.* Canon 2.

47. *Id.* R. 2.2.

48. *Id.* R. 2.3(A).

49. *Id.* R. 2.4(B). Specifically of interest here is the fact that judges are not to be influenced in conduct or judgment by "family, social, political, financial, or other . . . relationships." *Id.*

50. *Id.* R. 2.6(A).

51. *Id.* R. 2.9. "Ex parte communications are 'those that involve fewer than all of the parties

making public statements on pending cases that might affect the outcome of the ultimate decision.<sup>52</sup>

Canon 3 requires judges to conduct their personal and extrajudicial activities in a way that minimizes “the risk of conflict with” official obligations.<sup>53</sup> Judges may engage in lawful extrajudicial activities provided those activities do not: (1) “interfere with the proper performance of the judge’s judicial duties”;<sup>54</sup> (2) “lead to frequent disqualification”;<sup>55</sup> (3) “appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality”;<sup>56</sup> or (4) “appear to a reasonable person to be coercive.”<sup>57</sup> Additionally, Canon 3 prohibits “use of court premises, staff, stationary, equipment[,] or other resources, except for incidental . . . activities that concern the law.”<sup>58</sup> Essentially, while judges are allowed to engage in extrajudicial activities, they never shed their judicial duties.<sup>59</sup>

Despite these limitations, the canons do not act to deprive judges of the joys incident to human existence. Indeed, the Judicial Code observes that participation in extrajudicial activities “integrate[s] judges into their communities, and furthers public understanding of and respect for” the judiciary.<sup>60</sup> Judges simply must remain vigilant to avoid allowing personal

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who are legally entitled to be present during the discussion of any matter. They are barred in order to ensure that ‘every person who is legally interested in a proceeding [is given the] full right to be heard according to law.’” *In re Thoma*, 873 S.W.2d 477, 496 (Tex. Rev. Trib. 1994, no appeal) (alteration in original) (quoting JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS, § 6.01, at 145 (1990)). However, in *Onnen v. Sioux Falls Independent School District*, the Supreme Court of South Dakota held that a litigant did not engage in improper ex parte communication when a defense witness wished the judge “happy birthday” via the judge’s Facebook page. *Onnen v. Sioux Falls Indep. Sch. Dist.* #49-5, 801 N.W.2d 752, 757–58 (S.D. 2011). The court reasoned that the communication was “incidental” and did not concern “a pending or impending proceeding.” *Id.* at 758.

52. MODEL CODE OF JUDICIAL CONDUCT R. 2.10(A) (2007). Canon 2 also requires judges to be dignified when conversing with jurors, attorneys, and litigants, as well as others that come into contact with the court. *Id.* R. 2.8(B).

53. *See id.* Canon 3 (elaborating on judicial participation in outside activities and encouraging such participation as long as judicial impartiality can be maintained).

54. *Id.* R. 3.1(A).

55. *Id.* R. 3.1(B).

56. *Id.* R. 3.1(C).

57. *Id.* R. 3.1(D).

58. *Id.* R. 3.1(E).

59. Samuel Vincent Jones, *Judges, Friends, and Facebook: The Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 281, 299 (2011) (“[T]he status . . . and the responsibilities associated with the judicial office apply both during the judge’s professional activities and personal affairs.”).

60. MODEL CODE OF JUDICIAL CONDUCT R. 3.1 cmt. 2 (2007); *cf. In re A.H. Robins Co.*, 602 F. Supp. 243, 245 (D. Kan. 1985) (explaining that in order to determine whether a judge is biased, prejudiced, or has compromised his impartiality, a reviewing court or committee may look

relationships to influence or impair judicial conduct.<sup>61</sup> Judges may participate in the arts, sports, social, political, and recreational activities, but must avoid activities that detract from the dignity of the office or interfere with the performance of judicial duties.<sup>62</sup> In short, the Judicial Code does not exist to insulate judges from society; rather, it serves to preserve the impartiality required by judicial office amid the realities of being a public official.<sup>63</sup>

### C. *Judicial Misbehavior Through SNSs*

Though offline conduct remains the primary source of violations of the Judicial Code,<sup>64</sup> judges are equally susceptible to violations while

only at conduct by the judge that is extrajudicial in nature).

61. MODEL CODE OF JUDICIAL CONDUCT R. 2.4(B) (2007).

62. *See id.* R. 2.1 ("The duties of judicial office . . . shall take precedence over all of a judge's personal and extrajudicial activities.").

63. *See id.* pmbl. ("The Code is intended . . . to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies."). Commentators suggest that harsher standards, like sequestering judges from the broader society, would be undesirable. Steven Lubet, *Judicial Ethics and Private Lives*, 79 NW. U. L. REV. 983, 988-90 (1985). Lubet observed:

The dispensation of justice is advanced by the institution of a judiciary that is ethnically, socially, ideologically, and economically diverse. The goal of a system of judicial restrictions should be to draw the line between those nonjudicial activities that enrich, or at least are harmless to, the judiciary and those that actually detract from or interfere with the business of judging. This line should not be drawn so as to eliminate all perceivable evils and temptations. Rather, the delineation should give the women and men of the judiciary every reasonable degree of latitude, barring activities only where they do measurable damage to the court's dignity, available time and energy, or appearance of impartiality.

*Id.* at 990 (citing Robert B. McKay, *The Judiciary and Nonjudicial Activities*, 35 LAW & CONTEMP. PROBS. 9, 12 (1970)); *see also* Robert B. McKay, *The Judiciary and Nonjudicial Activities*, 35 LAW & CONTEMP. PROBS. 9, 12 (1970) ("To judge in the real world a judge must live, breathe, think, and partake of opinions in that world.").

64. *See, e.g., In re Davis*, 82 S.W.3d 140, 142, 145, 150 (Tex. Spec. Ct. Rev. 2002) (holding that a judge who (1) wrote a letter to the district attorney suggesting the judge had biblical authority for his decision-making; (2) compared an assistant prosecutor to a prison guard at Auschwitz; and (3) equated a district attorney's criticism of the judge to fornication with an assistant, violated the judge's duty to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary); *In re Thoma*, 873 S.W.2d 477, 483, 490-95 (Tex. Rev. Trib. 1994, no appeal) (holding that a judge violated the judicial canons when he conspired "to extort money from a party in" a judicial proceeding and "engaged in ex parte communications with criminal defendants" regarding pending criminal matters); *see also In re Cummings*, 211 P.3d 1136, 1138-39 (Alaska 2009) (holding that a judge violated the prohibition against ex parte communication when he intentionally passed notes to the prosecution team in a criminal case); *In re Ackel*, 745 P.2d 92, 94-95 (Ariz. 1987) (citing a judge's "conduct in 'hugging' [a] litigant, . . . using profanity and language with sexual overtones[,] and asking the litigant to go 'for a drink' with" him as inappropriate conduct that violated the judicial ethical canons), *overruled on other grounds by In re Jett*, 882 P.2d 414 (Ariz.

participating on SNSs. For example, a Georgia judge recently resigned his position after newspapers reported that he contacted and established a Facebook relationship with a woman who was appearing before him as a criminal defendant.<sup>65</sup> During the relationship, the judge met the defendant for lunch, she accepted a loan from the judge, and they discussed her case.<sup>66</sup> The reports further revealed that the judge visited the defendant in her apartment and signed an order releasing her on her own recognizance.<sup>67</sup> It is noteworthy that the judge's conduct in this case would warrant sanctions whether the relationship began on Facebook or by some face-to-face method.<sup>68</sup> The nature of the relationship between the judge and the defendant, the content of their communication, and the judicial actions on the defendant's behalf violated the Judicial Code without reference to the online nature of the communications.<sup>69</sup>

What if the judge's relationship with the defendant followed a different path? Suppose the judge and defendant were Facebook friends before criminal charges were filed. Alternatively, suppose the judge and defendant friended each other for an innocent reason, such as if their children played on the same recreational volleyball team. Furthermore, imagine there was no online or offline ex parte contact between the two, other than the fact that each could view the other's Facebook profile page.

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1994) (en banc); *In re Flanagan*, 690 A.2d 865, 866–67, 881 (Conn. 1997) (holding that a judge who had a three-year affair “with a married court reporter who [was] regularly . . . assigned to his courtroom” violated Canon 1 because his conduct would lead an observer to question the judiciary’s integrity and lose confidence in it); *In re Servaas*, 774 N.W.2d 46, 54–55 (Mich. 2009) (discussing that a judge who made sexually explicit drawings and included them in the court’s files and who commented on the small chest size of a female employee violated Canons 1 and 2); *In re White*, 499 S.E.2d 813, 816 (S.C. 1998) (holding that a judge who lied on his application to become a magistrate violated Canon 1 by taking judicial office after falsifying his academic credentials).

65. Herbert B. Dixon Jr., *The Black Hole Effect: When Internet Use and Judicial Ethics Collide*, JUDGES’ J., Fall 2010, at 38, 38 (citing Kathryn Hayes Tucker, *Ga. Judge Steps Down Following Questions About Facebook Relationship with Defendant*, LAW.COM (Jan. 7, 2010), <http://www.law.com/jsp/article.jsp?id=1202437652986&slreturn=1>).

66. *Id.*

67. *Id.* However, the local district attorney did not file any criminal charges, and the judge chose to resign his position only when the allegations came to light publicly. *Id.*

68. See MODEL CODE OF JUDICIAL CONDUCT Canon 3 (2007) (“A judge shall conduct the judge’s personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.”); cf. MODEL RULES OF PROF’L CONDUCT R. 1.8(e) cmt. 18 (2002) (stating that no attorney may engage in sexual relations with a client unless a consensual sexual relationship existed beforehand).

69. See Herbert B. Dixon Jr., *The Black Hole Effect: When Internet Use and Judicial Ethics Collide*, JUDGES’ J., Fall 2010, at 38, 38 (detailing how a judge and a defendant currently before the judge had extensive ex parte communications that clearly caused the judge to abandon his impartiality).

Would this Facebook relationship be a violation of the judge's ethical duties? Would the judge violate the canons by continuing to preside in the case despite the Facebook relationship? This hypothetical scenario, compared to the facts as they actually unfolded, suggests that the actual nature of the judge's relationship, not the online manifestation of that relationship, caused the ethical problems for the judge.

In another highly publicized case, a North Carolina judge faced a reprimand when he became Facebook friends with an attorney trying a divorce and custody case before him.<sup>70</sup> The Judicial Standards Commission reprimanded the judge for conducting ex parte communications with that attorney when the judge read and posted comments about the pending case on the attorney's Facebook page.<sup>71</sup> Here again, the fact that improper ex parte communications occurred, not the fact that the judge and attorney were Facebook friends or that the ex parte communications occurred in the virtual world, served as the basis for the sanction.<sup>72</sup> The ex parte communication would have been just as improper had it occurred over the telephone<sup>73</sup> or via face-to-face communication.<sup>74</sup>

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70. Judicial Standards Comm'n of the State of N.C., Inquiry No. 08-234, at 2-3 (2009). Similarly, a substitute judge in Nevada lost his position after reports surfaced that his MySpace profile included hostile comments toward prosecuting attorneys. K. C. Howard, *MySpace Judgment: Guilty*, LAS VEGAS REV. J. (Sept. 26, 2008, 4:38 PM), <http://www.lvrj.com/news/9121536.html>. Once again though, it was the hostile statements that evidenced improper conduct, not the particular medium. *Id.*

71. Judicial Standards Comm'n of the State of N.C., Inquiry No. 08-234, at 2-3 (2009). In particular, the commission found:

On or about the evening of September 10, 2008, Judge Terry checked [the attorney's] "Facebook" account and saw where [the attorney] had posted "how do I prove a negative[.]" Judge Terry posted on his "Facebook" account, [that] he had "two good parents to choose from" and "Terry feels that he will be back in court" referring to the case not being settled. [The attorney] then posted on his "Facebook" account, "I have a wise Judge[.]"

...

On or about September 11, 2008, Judge Terry wrote on his "Facebook" account [that], "he was in his last day of trial[.]" [The attorney] then wrote "I hope I'm in my last day of trial." Judge Terry responded stating "you are in your last day of trial[.]"

*Id.* at 2.

72. *See id.* at 2-4 (noting that it was the judge's actions and communications that violated Canons 1, 2, and 3 of the Judicial Code as well as the North Carolina Constitution).

73. *Cf. Erskine v. Baker*, 22 S.W.3d 537, 540 (Tex. App.—El Paso 2000, pet. denied) (holding that a judge's private telephone conversation with an attorney and a witness in a pending case was improper ex parte communication).

74. *Cf. Fletcher v. Comm'n on Judicial Performance*, 968 P.2d 958, 972 (Cal. 1999) (describing a judge's ex parte communication at a men's fellowship group with a criminal defendant whose case was pending in his court).

These cases illustrate that judges can use social media to violate the Judicial Code, just as they can when using any other communication medium. The aforementioned violations arose from the content, not the medium. It is important to observe, however, that in these cases the fact that improper communications were memorialized on social media allowed parties to become aware of and to prove the communications much easier than if they were made through other channels.

#### D. *The Permissive and Restrictive Approaches*

##### 1. The Permissive Approach to SNSs

The New York State Commission on Judicial Ethics, the first judicial ethics committee to render an opinion on a judge's social media use, found nothing "inherently inappropriate about a judge joining and making use of a social network."<sup>75</sup> Relying on a prior opinion, the commission noted that judges may generally socialize with attorneys that appear in the judge's courtroom, subject to the Judicial Code.<sup>76</sup> The commission also noted that there was nothing per se unethical about communicating via social networking technology versus any other form, such as phones or a web page.<sup>77</sup> The commission concluded, "the question is not whether a judge can use a social network but, rather, how he/she does so."<sup>78</sup>

Similarly, the Ethics Committee of the Kentucky Judiciary and the Ohio Board of Commissioners on Grievances and Discipline also released opinions that followed the New York commission's conclusions.<sup>79</sup> These opinions allow judges to participate on SNSs and to establish friend connections with attorneys that may appear before them because SNS

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75. N.Y. State Advisory Comm. on Judicial Ethics, Op. 08-176, para. 7 (2009), *available at* <http://www.courts.state.ny.us/ip/judicialethics/opinions/08-176.htm>.

76. *Id.* (citing N.Y. State Advisory Comm. on Judicial Ethics, Op. 07-141 (2007), *available at* <http://www.nycourts.gov/acoje/opinions/07-141.htm>).

77. *Id.* (citing N.Y. State Advisory Comm. on Judicial Ethics, Op. 07-135 (2007), *available at* <http://www.nycourts.gov/acoje/opinions/07-135.htm>).

78. *Id.*

79. Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 3 (2010), *available at* <http://courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf> (agreeing with the caveats of the New York committee that judges should be aware that online social relationships are a factor which may require disclosure and/or recusal (citing N.Y. State Advisory Comm. on Judicial Ethics, Op. 08-176 (2009))); Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 2010-7, at 5-6, 8-9 (2010), *available at* [http://www.sconet.state.oh.us/Boards/BOC/Advisory\\_Opinions/2010/default.asp](http://www.sconet.state.oh.us/Boards/BOC/Advisory_Opinions/2010/default.asp) (follow "Opinion 2010-7" hyperlink; then accept the download prompt) (summarizing the opinions of the Kentucky and New York committees and ultimately deciding along similar lines).

friendships alone do not violate the Judicial Code.<sup>80</sup> However, both opinions cautioned that judges may not use social media in the same manner as the public at large because their use is governed by the canons of conduct.<sup>81</sup>

In 2009, the South Carolina Advisory Committee on Standards of Judicial Conduct also weighed in on the effect of SNSs on judicial ethics.<sup>82</sup> It concluded that “[a] judge may be a member of Facebook and be friends with law[-]enforcement officers and employees . . . [so] long as they do not discuss anything related to the judge’s position.”<sup>83</sup> The committee reiterated a judge’s obligation to act “in a manner that promotes public confidence in the” judiciary,<sup>84</sup> but also noted it is neither wise nor possible to insulate oneself from the larger community.<sup>85</sup> Therefore, “[a]llowing a Magistrate to be a member of a [SNS] allows the community to see how the judge communicates and gives the community a better understanding of the judge.”<sup>86</sup>

80. Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 3 (2010), *available at* <http://courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf>; N.Y. State Advisory Comm. on Judicial Ethics, Op. 08-176 (2009); *see* Ohio Bd. of Comm’rs on Grievances and Discipline, Op. 2010-7, at 8 (2010) (agreeing with the Kentucky and New York opinions).

81. Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 4 (2010) (“[T]his opinion should not be construed as an explicit or implicit statement that judges may participate in [SNSs] in the same manner as members of the general public.”); Ohio Bd. of Comm’rs on Grievances and Discipline, Op. 2010-7, at 8 (2010) (stressing that while there are no bright line rules, judges must be prudent while utilizing SNSs, much more so than a nonjudicial officer).

82. S.C. Advisory Comm. on Standards of Judicial Conduct, Op. No. 17-2009 (2009), *available at* <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009>.

83. *Id.* para. 2.

84. *Id.* para. 3.

85. *Id.*

86. *Id.* The permissive idea seems to adopt the argument that it would be both “intellectually lazy” and “self-defeating” to isolate judges from the communities they serve. Steven Lubet, *Judicial Ethics and Private Lives*, 79 NW. U. L. REV. 983, 988–90 (1985). Lubet notes that both the judge and the public benefit from judicial exposure to public life:

Not only is it impossible to isolate a judge from opinion-shaping forces, it is undesirable to give the impression that this has been accomplished. Assuming that judges are not to be sealed hermetically in their homes after working hours, they will continue to form opinions as a consequence of exposure to friends, colleagues, and the media. In the absence of nonjudicial activities that reflect the tenor of a judge’s ideas, the public and the bar will have no way of knowing of the jurist’s proclivities. A ban on nonjudicial activities will not erase biases, it will simply hide them. A judge who loves animals will not lose this predisposition merely because membership in the A.S.P.C.A. has been prohibited. It will be a rare case where knowledge of a judge’s activities will be relevant; nonetheless, public information on the judiciary is valuable in and of itself.

Similarly, judges’ knowledge of the public is essential to the dispensation of justice. It is not



## 2. The Restrictive Approach to SNSs

Two months after the New York commission's decision, the Florida Judicial Ethics Advisory Committee considered a similar question and took a much more restrictive position.<sup>87</sup> The committee held that judges could become members of social media networks, but could not list attorneys appearing before the judge as a friend.<sup>88</sup> The Florida committee reasoned that identifying an attorney as a friend violates judicial canons that prohibit judges from "convey[ing] the impression that [others] are in a special position to influence the judge."<sup>89</sup> The committee did not conclude that social networking friends were in a special position to influence the judge, but rather that their designation created the impression that they were specially situated.<sup>90</sup>

In 2011, the Committee of Judicial Ethics for the Supreme Judicial Court of Massachusetts and the Oklahoma Judicial Ethics Advisory Panel followed Florida's restrictive approach.<sup>91</sup> The Oklahoma panel issued an opinion prohibiting judges from identifying "court staff,

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enough to say that a judge is enriched by knowledge of the real world; rather, the nature of modern law absolutely requires that judges "live, breathe, think and partake of opinions in that world." . . . It is probable that a majority of legal tests and rules which a judge is called upon to apply call for judgments which involve common experience.

*Id.* at 989 (quoting Robert B. McKay, *The Judiciary and Nonjudicial Activities*, 35 LAW & CONTEMP. PROBS. 9, 12 (1970)).

87. See Fla. Judicial Ethics Advisory Comm., Op. No. 2009-20, paras. 1-8 (2009), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html> (ascertaining (1) whether a judge can post comments on SNSs; (2) whether a judge can add lawyers as "friends" who may appear before the judge; and (3) applicable rules for committees who conduct election campaigns on behalf of judges). While the committee answered the first issue in the affirmative, it would not allow judges to add lawyers as friends. *Id.* paras. 2-4.

88. *Id.*

89. *Id.* paras. 20-21. The Florida committee noted three elements that make social networking impermissible under the Judicial Code:

First, the judge must establish the social networking page. Second, the site must afford the judge the right to accept or reject contacts or "friends" on the judge's page, or denominate the judge as a "friend" on another member's page. Third, the identity of the "friends" or contacts selected by the judge, and the judge's having denominated himself or herself as a "friend" on another's page, must then be communicated to others. Typically, this third element is fulfilled because each of a judge's "friends" may see on the judge's page who the judge's other "friends" are. Similarly, all "friends" of another user may see that the judge is also a "friend" of that user.

*Id.* para. 21. However, contrasting other SNSs with Facebook, the commission noted that other sites lack friend features, and judicial use of such sites would comply with the Judicial Code. *Id.* n.1.

90. *Id.* para. 32.

91. Mass. Comm. on Judicial Ethics, Op. No. 2011-6 (2011), available at <http://www.mass.gov/courts/sjc/cje/2011-6n.html>; *In re* Judicial Ethics Op. 2011-3, 261 P.3d 1185, 1186 (Okla. Jud. Ethics Advisory Panel 2011).

law[-]enforcement officers, social workers, attorneys[,] and others who may appear in his or her court as 'friends'" on their account.<sup>92</sup> The panel agreed with the Kentucky committee's observation that social media participation was "fraught with peril for [j]udges" and determined that "public trust in the impartiality and fairness of the judicial system is so important that [it] is imperative to err on the side of caution where the situation is 'fraught with peril.'"<sup>93</sup> While the Massachusetts committee allowed judges to use social media generally, it prohibited judges "from associating in any way on [SNSs] with attorneys who may appear before them."<sup>94</sup> The committee noted that a Massachusetts judge may friend an attorney only when that judge would recuse himself if the friended attorney were to appear before her.<sup>95</sup>

### 3. Specific Limitations and Exceptions to SNSs

One Florida committee opinion distinguished a judge's personal social media activity from social media activity completed on the judge's behalf.<sup>96</sup> For example, persons conducting a campaign for a judge may establish a social networking page and allow attorneys who appear before the judge to list themselves as the judge's fans, friends, or supporters.<sup>97</sup> However, neither the judge nor the campaign committee could elect to accept or reject those who chose to identify themselves as a fan or supporter.<sup>98</sup> Under these circumstances, the Florida committee concluded that such listing does "not convey the impression that [the listed attorney would be] in a special position to influence the judge."<sup>99</sup>

Two subsequent Florida committee opinions refined this initial restrictive approach.<sup>100</sup> In the first opinion, the committee stated that the

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92. *In re Judicial Ethics Op. 2011-3*, 261 P.3d at 1185.

93. *Id.* at 1186; *accord* Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 4 (2010), available at <http://courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf> (initializing the "fraught with peril" language to describe judicial ethics issues with regards to SNS usage).

94. Mass. Comm. on Judicial Ethics, Op. No. 2011-6, para. 5 (2011).

95. *Id.*

96. See Fla. Judicial Ethics Advisory Comm., Op. No. 2009-20, paras. 5-8 (2009), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html> (answering in the affirmative to questions regarding committee use of social network technology for election campaign purposes).

97. *Id.* paras. 31-32.

98. *Id.* n.1.

99. *Id.* para. 37 n.1.

100. Fla. Judicial Ethics Advisory Comm., Op. No. 2010-06 (2010), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-06.html>; Fla. Judicial Ethics Advisory Comm., Op. No. 2010-05 (2010), available at <http://www.jud6.org/>

prohibition against judges designating attorneys who may appear before them as friends does not apply to judicial candidates.<sup>101</sup> The second opinion, released a week later, further defined the limitations on a sitting judge's social media activities.<sup>102</sup> There, one inquiring judge considered an SNS designation of friend to mean only that the person so designated is acquainted with the judge, not that he is a friend in the traditional sense.<sup>103</sup> To that end, the judge intended to post a disclaimer on his Facebook profile page.<sup>104</sup> The committee unanimously determined that such disclaimers would not effectively "dispel the impermissible message" that a friend could still be in a position to influence a judge.<sup>105</sup> Additionally, the committee noted that there was no guarantee that a reader would locate or read the disclaimer.<sup>106</sup> Consequently, even if visitors read the disclaimer, it could not overcome the impression of impropriety created by the designation.<sup>107</sup> Sticking to the view that judicial SNS use would be unethical, the committee "reject[ed] any contention that a judge can engage in unethical conduct so long as the judge announces at the time that the judge perceives the conduct to be ethical."<sup>108</sup>

The opinion also addressed whether judges could create a social network "safe harbor" by modifying the procedures by which they accept friends.<sup>109</sup> The committee rejected the proposed safe harbors because the friend description would establish a special class of lawyers who could appear to the public as having a special relationship with the judge, as opposed to lawyers that did not request friend status or did not participate in the particular SNS at all.<sup>110</sup> The "right and the practice of selectivity

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LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-05.html.

101. Fla. Judicial Ethics Advisory Comm., Op. No. 2010-05, paras. 1–2, 8 (2010). This results because the Judicial canon at issue here does not apply to judicial candidates. *Id.* para. 5 (citing *In re Kinsey*, 842 So. 2d 77, 85 (Fla. 2003)).

102. Fla. Judicial Ethics Advisory Comm., Op. No. 2010-06 (2010). The issues presented here addressed the act of friending attorneys on SNSs, namely the acceptability of an "admit all" friend policy and the efficacy of a disclaimer that online "friends" were not necessarily friends in the traditional sense. *Id.* paras. 1–6.

103. *Id.* para. 9.

104. *Id.* para. 18.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* para. 23. Specifically, the procedures of: (1) accepting as a friend all persons that are either recognized by the judge "or who share a number of common 'friends' with the judge"; or (2) accepting as a friend any and all members who request to be the judge's friend on the SNS. *Id.*

110. *Id.* para. 25.

and exclusivity[.]” which is inherent in the acceptance or denial of an SNS friend, is what conveys the impression of impropriety prohibited by the canons of judicial conduct.<sup>111</sup>

The minority stressed, however, that Florida precedent established that a judge’s friendship with an attorney is not grounds for disqualification in and of itself.<sup>112</sup> For example in *In re Estate of Carlton*,<sup>113</sup> the Supreme Court of Florida noted that if a judge’s friendship with a lawyer was the sole basis for disqualification, most judges in rural areas and some in urban areas would frequently be subject to disqualification.<sup>114</sup> The minority further observed that there was “no discernible difference between a judge’s friendship with an attorney on [SNSs] and a judge having lunch with an attorney, playing tennis with an attorney, or engaging in a myriad of other activities with attorneys who appear before the judge.”<sup>115</sup> While the majority held that a judge’s exclusivity in selecting friends on a Facebook account conveys the appearance of being in a position to influence the

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111. *Id.* para. 26 (citing Fla. Judicial Ethics Advisory Comm., Op. No. 2009-20 (2010), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html>). *Contra id.* para. 35 (minority op.) (“The exclusivity and selectivity by the judge in choosing to spend time and enjoyment with some attorneys and not others is far more apparent than ‘friendship’ in the social networking setting of the [I]nternet.”).

112. *See id.* para. 32 (“[E]ven if the term ‘friend’ on an Internet [SNS] means a friend in the traditional sense, which it does not, that relationship without more is ethically permissible.” (citing *Stevens v. Americana Healthcare Corp. of Naples*, 919 So. 2d 713, 716 (Fla. Dist. Ct. App. 2006))). In *Stevens v. Americana Healthcare Corporation of Naples*, the judge disclosed that he was personally acquainted with witnesses and, upon discussion with the attorneys, invited them to move for disqualification. *Stevens*, 919 So. 2d at 714–15. The court concluded that the disclosure alone did not require disqualification, yet the judge’s invitation did. *Id.* at 715–16 (citing *Pool Water Prods., Inc. v. Pools by L.S. Rule*, 612 So. 2d 705, 707 (Fla. Dist. Ct. App. 1993)). Because the operative friendship in *Stevens* was between the judge and multiple witnesses, and not the actual attorneys, reliance upon the opinion by the Florida Judicial Ethics Advisory Committee’s minority is tenuous at best.

113. *In re Estate of Carlton*, 378 So. 2d 1212 (Fla. 1979).

114. *Id.* at 1220. Other jurisdictions have taken similar stances on friendships between judges and attorneys who may appear before them. *See, e.g., Demoulas v. Demoulas Super Mkts., Inc.*, 703 N.E.2d 1141, 1147 (Mass. 1998) (concluding that not every “public social discussion between [a] judge and [a] lawyer requires an evidentiary hearing” to determine whether the judge’s impartiality can be questioned (citing *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981))); *In re Schwartz*, 255 P.3d 299, 304 (N.M. 2011) (“[A] judge’s impartiality will not normally be questioned merely because a judge has a social relationship with an attorney.” (citation omitted)); *Brosseau v. Ranzau*, 81 S.W.3d 381, 400 (Tex. App.—Beaumont 2002, no pet.) (“[T]he existence of a friendship between a judge and an attorney appearing before him is not sufficient, without more, to demonstrate partiality.” (citing *Woodruff v. Wright*, 51 S.W.3d 727, 736–37 (Tex. App.—Texarkana 2001, pet. denied))).

115. Fla. Judicial Ethics Advisory Comm., Op. No. 2010-06, para. 35 (2010) (minority op.), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-06.html>.

judge, the minority opinion suggests that judges engaging in exclusivity and selectivity on SNSs is no different from judges deciding who to spend time with in real life.<sup>116</sup>

### III. SUGGESTIONS FOR THE ETHICAL JUDGE ONLINE

Judicial ethics opinions on the use of SNSs are divided between the permissive<sup>117</sup> and the restrictive approaches.<sup>118</sup> The restrictive approach, when taken to its logical endpoint, could amount to a virtual ban on any social networking.<sup>119</sup> A ban on friending or interactively connecting with attorneys or others who may appear before the judge could theoretically include an extensive cross-section of people, as practically anyone could potentially appear before a judge at one time or another.<sup>120</sup> A restrictive approach does exactly what it purports—it potentially restricts judges' use of social networking so much that inadvertent conflicts could become the norm rather than the exception.<sup>121</sup>

#### A. *Public Confidence in the Judiciary*

Prohibiting judges from participating in social media arguably serves to

116. *Id.* paras. 34–35. *But see id.* paras. 26–28 (majority op.) (noting that the process of acceptance or rejection of online friends conveys an impression of a special relationship with the judge. Opinion No. 2009-20 established that it is unethical for a lawyer who appears before a judge to be friends with the judge in Florida. Fla. Judicial Ethics Advisory Comm., Op. No. 2009-20, paras. 3–4 (2009), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html>. Therefore, the question remains: Does this rule also apply to litigants who appear before a judge?

117. Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 5 (2010), available at <http://courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf>; Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 2010-7, at 8–9 (2010), available at [http://www.sconet.state.oh.us/Boards/BOC/Advisory\\_Opinions/2010/default.asp](http://www.sconet.state.oh.us/Boards/BOC/Advisory_Opinions/2010/default.asp) (follow “Opinion 2010-7” hyperlink; then accept the download prompt); S.C. Advisory Comm. on Standards of Judicial Conduct, Op. No. 17-2009, para. 2 (2009), available at <http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009>.

118. Fla. Judicial Ethics Advisory Comm., Op. No. 2009-20, paras. 1–8 (2009); *In re* Judicial Ethics Opinion 2011–3, 261 P.3d 1185, 1186 (Okla. Jud. Ethics Advisory Panel 2011).

119. *Cf.* Fla. Judicial Ethics Advisory Comm., Op. No. 2009-20, paras. 25–26 (2009) (disallowing judges from participating in extrajudicial activities that could result in “frequent disqualification of the judge”).

120. *See* Fla. Judicial Ethics Advisory Comm., Op. No. 2010-06, para. 36 (2010) (minority opinion) (“[I]f it is unethical for a judge to have a lawyer who appears before the judge as a Facebook ‘friend,’ then it would be equally unethical for a judge to have as a Facebook ‘friend’ any person who may appear before the judge as a litigant.” (emphasis added)). It would seem then that a judge under such a prohibition would be limited to friending only those persons who she would otherwise be prohibited from presiding over, such as a spouse or a close relative.

121. *See id.* (“[SNS] ‘friends’ can be hundreds of people, comprising a network.”).

promote public confidence in the judiciary.<sup>122</sup> Close inspection of the publicized cases in Georgia and North Carolina reveal nothing extraordinary about the judicial misconduct, other than the fact that an SNS memorialized the unethical behavior.<sup>123</sup> There are many less publicized examples of inappropriate relationships between judges and litigants,<sup>124</sup> judges and lawyers,<sup>125</sup> and court staff that may have been front-page news if the evidence of the relationships was broadcasted on SNSs. In addition, there are numerous examples where judges improperly engaged in inappropriate ex parte communication without making national news.<sup>126</sup> Judicial misconduct is a serious offense when it occurs in private, but when such evidence is memorialized across an SNS, it does little to promote confidence in the judiciary.

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122. See, e.g., Samuel Vincent Jones, *Judges, Friends, and Facebook: The Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 281, 285–90 (2011) (discussing the necessity of prohibitions to control the effects of judicial social networking and to avoid the decline of public confidence in the judiciary).

123. Compare Judicial Standards Comm'n of the State of N.C., Inquiry No. 08-234, at 1–3 (2009), available at <http://www.aoc.state.nc.us/www/public/coal/jsc/publicreprimands/jsc08-234.pdf> (reprimanding the judge for failing to ensure integrity in the judiciary by participating in ex parte online communication via Facebook as well as conducting independent ex parte online research that influenced his decisions), with Judge Herbert B. Dixon Jr., *The Black Hole Effect: When Internet Use and Judicial Ethics Collide*, JUDGES' J., Fall 2010, at 38, 38 (describing the resignation of a Georgia judge after allegations of inappropriate contacts on Facebook became public).

124. See, e.g., *In re Jett*, 882 P.2d 414, 426 (Ariz. 1994) (en banc) (suspending a judge for the willful misconduct of releasing her live-in boyfriend from police custody); *In re Platt*, 48 Cal. 4th CJP Supp. 227, 231, 251–52 (Comm'n Jud. Performance 2002), available at [http://cjp.ca.gov/res/docs/s\\_c\\_cites/Platt\\_48\\_Cal.4th\\_CJP\\_Supp.\\_227.pdf](http://cjp.ca.gov/res/docs/s_c_cites/Platt_48_Cal.4th_CJP_Supp._227.pdf) (removing a judge for intervening in a friend's daughter's criminal case); *In re Edwards*, 694 N.E.2d 701, 718–19 (Ind. 1998) (per curiam) (disciplining a judge, with permanent removal, for presiding over and attempting to influence cases involving parties in a sexual relationship with the judge); *In re Ziegler*, 750 N.W.2d 710, 721 (Wis. 2008) (per curiam) (reprimanding a judge who presided over cases “when she knew that her spouse was a director” to one of the parties).

125. See, e.g., *In re Schwartz*, 255 P.3d 299, 301, 307 (N.M. 2011) (reprimanding and fining a judge for failing to timely recuse himself after initiating a romantic relationship with an assistant public defender who had cases pending before him and continuing to rule in those cases after recusing himself); Tex. Comm'n on Judicial Conduct, Pub. Reprimand of Hon. Richard W. B. “Rick” Davis, at 7 (2008), available at [http://alt.coxnewsweb.com/shared-blogs/austin/courts/upload/2008/11/agency\\_reprimands\\_ex-judge\\_fro/Davis%20reprimand.pdf](http://alt.coxnewsweb.com/shared-blogs/austin/courts/upload/2008/11/agency_reprimands_ex-judge_fro/Davis%20reprimand.pdf) (reprimanding a judge for allowing a grand jury the judge appointed to be influenced by a friend and political supporter).

126. E.g., Miss. Comm'n on Judicial Performance v. Gordon, 955 So. 2d 300, 303, 306 (Miss. 2007) (suspending a municipal judge for ex parte communications with defendants appearing before him). See generally Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 432–33 (2004) (“Most examples of bad judging can be grouped into the following categories: (1) corrupt influence on judicial action; (2) questionable fiduciary appointments; (3) abuse of office for personal gain; (4) incompetence and neglect of duties; (5) overstepping of authority; (6) interpersonal abuse; (7) bias, prejudice, and insensitivity; (8) personal misconduct reflecting adversely on fitness for office; (9) conflict of interest; (10) inappropriate behavior in a judicial capacity; (11) lack of candor; and (12) electioneering and purchase of office.”).

### B. *Allowing SNS Use with Caution*

States adopting the permissive approach strongly caution judges about the dangers associated with SNS use.<sup>127</sup> The New York commission's opinion encourages judicial awareness of social media as a public forum and emphasizes that anything he or she places on SNSs may be viewed by persons beyond the intended audience.<sup>128</sup> The public nature of posts or links within the social networking profiles of attorneys or litigants appearing in the judge's court is distinguished from a judge maintaining that same information in her Rolodex or phone directory because the link is announced publicly.<sup>129</sup> One opinion notes that when a judge posts personal information to specific individuals, the public may draw a conclusion that the judge has a stronger bond with those individuals, regardless of whether a bond truly exists.<sup>130</sup> While the New York commission eschews a per se ban on SNS participation, its opinion suggests there is much more to managing SNSs than meets the eye.<sup>131</sup>

Furthermore, perhaps the pitfalls identified by the New York commission's opinion gave rise to the Kentucky committee's conclusion that SNS participation by judges is "fraught with peril."<sup>132</sup> The Kentucky committee's opinion advises judges to be mindful of whether an online connection on SNSs, in combination with other facts, establishes close social relations that require disclosure or recusal.<sup>133</sup> Videos, photographs, personal information, and commentary are commonly displayed on profile pages, yet when the same information is displayed by judges, those expressions could be problematic.<sup>134</sup> The Kentucky committee warns

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127. See, e.g., Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 4 (2010), *available at* <http://courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf> ("[T]he Committee is compelled to note that, as with any public media, [SNSs] are fraught with peril for judges . . .").

128. N.Y. State Advisory Comm. on Judicial Ethics, Op. 08-176, para. 9 (2009), *available at* <http://www.courts.state.ny.us/ip/judicialethics/opinions/08-176.htm>.

129. *Id.* para. 10.

130. *Id.*

131. *Id.* paras. 9–11. For example, the opinion warns that SNS profiles may serve as an additional channel for informal legal advice or other communication with attorneys and litigants, yet such communication is just as improper as a face-to-face meeting. *Id.* para. 11.

132. Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 4 (2010).

133. See *id.* at 4–5 (delineating several considerations implicated by social media use, such as the pendency of upcoming court proceedings, the form of online connections, whether ex parte communications will occur, and the extent of any ex parte communication).

134. *Id.* (citing *In re Complaint of Judicial Misconduct*, 575 F.3d 279 (3d. Cir. 2009)). In *In re Complaint of Judicial Misconduct*, Chief Judge Alex Kozinski was publicly reprimanded for maintaining a website that contained sexually explicit material and other offensive content. *In re Complaint of Judicial Misconduct*, 575 F.3d at 280.

that while SNSs offer the “aura of private, one-on-one conversation,” matters posted online are much more public and are created in a medium that may never disappear.<sup>135</sup>

The Ohio Board of Commissioners on Grievances and Discipline clearly addressed the difficulty judges face when using SNSs by imposing eight restrictions required for compliance with local judicial conduct rules:<sup>136</sup>

1. A judge must maintain dignity in every comment, photograph, and other information shared on the social network.<sup>137</sup>
2. A judge must not foster social networking interactions with individuals or organizations if such communications erode confidence in the independence of judicial decision making.<sup>138</sup>
3. A judge should not make comments on a social networking site about any matters pending before the judge—not to a party, not to counsel for a party, not to anyone.<sup>139</sup>
4. A judge should not view a party's or witnesses' pages on a social networking site and should not use social networking sites to obtain information regarding the matter before the judge.
5. A judge should avoid making any comments on a social networking site about pending or impending matters in any court.<sup>140</sup>
6. A judge should disqualify himself or herself from a proceeding when the judge's social networking relationship with a lawyer creates bias or prejudice concerning the lawyer for a party.<sup>141</sup>
7. A judge may not give legal advice to others on a social networking site.<sup>142</sup>
8. A judge should be aware of the contents of his or her social networking page, be familiar with the social networking site policies and privacy controls, and be prudent in all interactions on a social networking site.<sup>143</sup>

These restrictions, however, are not in the rules but are applications of the relevant Ohio rules as to SNSs.<sup>144</sup> Nevertheless, they should serve to

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135. Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 5 (2010).

136. Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 2010-7, at 7–8 (2010), available at [http://www.sconet.state.oh.us/Boards/BOC/Advisory\\_Opinions/2010/default.asp](http://www.sconet.state.oh.us/Boards/BOC/Advisory_Opinions/2010/default.asp) (follow “Opinion 2010-7” hyperlink; then accept the download prompt).

137. *Id.* at 7.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 8.

142. *Id.*

143. *Id.*

144. See generally OHIO JUD. COND. R. 1.1–4.6 (2009) (adopting behavioral standards for the judiciary based upon the Model Code of Judicial Conduct).



remind judges to pause before joining and utilizing SNSs.<sup>145</sup>

C. *Alternative Uses Within the Permissive Approach*

The permissive approach leaves judges susceptible to post hoc, fact-based inquiries about whether the judge's SNS use violated the general appearance of impropriety or public confidence standards.<sup>146</sup> It may be easy to argue that when a judge's conduct creates an appearance of impropriety, it impairs public confidence in the judiciary.<sup>147</sup> Post hoc, fact-based inquiries would require judges to reveal not only publicly displayed matters from the SNS, but also other facts regarding relationships the judge might prefer to keep from the public eye. At a time when there are vigorous challenges to public confidence in the judiciary,<sup>148</sup> Kentucky's warning that SNS use is "fraught with peril"<sup>149</sup> is not one to take lightly.

Those judges permitted to use social media, however, may be able to minimize risks by utilizing available technology to avoid potential conflicts. Facebook, for example, not only allows users to create personal pages that include the friend function, but also allows users to create "fan" pages, which may be maintained for informational purposes only.<sup>150</sup> Using Facebook or other forms of SNSs in such a limited fashion could significantly restrict the site's interactive utility, but it could also avoid the

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145. Cf. Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 2010-7, at 8-9 (2010) (acknowledging that upholding the virtue required of judges is very challenging).

146. See generally Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1351-61, 1369 (2006) (providing an overview of the standards used to determine an appearance of impropriety and mentioning public confidence as an additional standard).

147. See *id.* at 1342 ("[The ABA] believed that a rule prohibiting the 'appearances of impropriety' [would] make the world think better of judges, but that belief is inconsistent with the evidence. The world will not think less well of judges if anyone can launch a plausible claim that any judge engaged in an act or omission that was *not* improper but might *appear* to be improper.").

148. See generally Keith R. Fisher, *Education for Judicial Aspirants*, 43 AKRON L. REV. 163, 185-89 (2010) (describing poll data indicating a general decline in public confidence in the judiciary). Indeed, according to a 1999 survey, a commanding majority of Texans believed that judicial decisions are affected by campaign contributions. TEX. OFFICE OF COURT ADMIN., STATE BAR OF TEX., THE COURTS AND THE LEGAL PROFESSION IN TEXAS: THE INSIDER'S PERSPECTIVE: A SURVEY OF JUDGES, COURT PERSONNEL, AND ATTORNEYS (1999), available at <http://www.courts.state.tx.us/pubs/publictrust/execsum.htm>.

149. Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 4 (2010), available at <http://courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf>.

150. Facebook Pages: What Are Facebook Pages? Should I Create One?, FACEBOOK HELP CENTER, <https://www.facebook.com/help/?page=205666086139358> (last visited Apr. 11, 2012). However, it should be noted that even these pages need to be managed by administrators who must have their own personal page. *Id.*

appearance of impropriety created by friending attorneys or others who may appear in the judge's court.<sup>151</sup>

Alternatively, judges can create blogs or microblogs<sup>152</sup> that are generally available for the public to view. A microblog is a form of blogging, such as Twitter, that allows a user to post or transmit brief updates online.<sup>153</sup> This form of social media does not include the troublesome friending problem caused by Facebook and other proprietary SNSs.<sup>154</sup> Judges can use blogs and microblogs as forums for information about the court or to provide more personal and expressive information about the judge while minimizing the risk that readers could be perceived as persons in a special relationship with the judge. Moreover, to avoid problems associated with ex parte communication, judges can disable comment functions by altering privacy settings.<sup>155</sup>

Finally, judges should be vigilant in monitoring and updating any SNS profiles they create. Technology changes at a rapid pace, and websites such as Twitter and Facebook update privacy applications on their own schedules.<sup>156</sup> These updates provide judges with additional means of protecting against unwanted disclosures, but only with a proactive approach to engaging in the new privacy settings as they are released.<sup>157</sup>

151. Samuel Vincent Jones, *Judges, Friends, and Facebook: The Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 281, 287–88 (2011) (“Among the most potentially problematic [SNS] activities involves judges engaging in Facebook ‘friending.’”).

152. Cf. Margaret M. DiBianca, *Ethical Risks Arising From Lawyers’ Use of (and Refusal to Use) Social Media*, 12 DEL. L. REV. 179, 181 (2011) (defining a microblog as a tool designed to transmit small pieces of information quickly and efficiently).

153. Cf. *id.* (participating in microblogging only allows for brief text updates).

154. Compare *id.* (describing a microblog as permitting a user to transmit only small amounts of information), with Samuel Vincent Jones, *Judges, Friends, and Facebook: The Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 281, 283–84 (2011) (discussing numerous functions allowed on Facebook).

155. Cf. MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A) (2007) (“A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter . . .”).

156. *Facebook Privacy Policy*, FACEBOOK, <http://www.facebook.com/about/privacy> (last visited Apr. 11, 2012); cf., e.g., Kevin Bankston, *Facebook’s New Privacy Changes: The Good, the Bad, and the Ugly*, ELECTRONIC FRONTIER FOUND. (Dec. 9, 2009), <https://www.eff.org/deeplinks/2009/12/facebooks-new-privacy-changes-good-bad-and-ugly> (explaining how privacy settings were simplified, yet the new default settings treat information as publicly available); *Twitter Privacy Policy*, TWITTER, <http://twitter.com/privacy> (last visited Apr. 7, 2012) (stating that effective June 23, 2011, “[w]e may revise [our] privacy policy from time to time”).

157. Cf. Matthew J. Hodge, *The Fourth Amendment and Privacy Issues on the “New” Internet: Facebook.com and MySpace.com*, 31 S. ILL. U. L.J. 95, 98–99, 110 (2006) (“[U]sers are allowed to restrict their privacy settings . . . . [The private] setting is not the default, but instead, a user must actively change the settings to restrict access.”).

Ultimately, when a judge creates the potential for two-way communication on SNSs, it is paramount to ensure the communications are proper and do not raise a matter that requires disclosure or recusal.<sup>158</sup>

#### IV. CONCLUSION

The Social Media Age shows no signs of abating.<sup>159</sup> Rapid technological developments in the SNS field increase the likelihood that more Americans will join the social networking revolution in upcoming years in some form.<sup>160</sup> For judges and those concerned about public confidence in the judiciary, this development presents seemingly irreconcilable conflicts. On one hand, it is unwise to keep judges from the forefront of technological change because some consensus indicates that both judges and the public are best served when judges are actively integrated into their communities.<sup>161</sup> With the sheer volume of Americans using SNSs daily, judges risk becoming increasingly isolated from an important part of the community when completely avoiding SNSs. This choice could ultimately impair the judiciary's ability to preside in cases where technological knowledge, or at least familiarity, is critical.

On the other hand, when a judge participates in social media, the judge confronts a virtual minefield because seemingly innocent activities may have serious and perhaps irreversible consequences if the activities appear improper.<sup>162</sup> The ethical requirements demand that judges examine SNS participation not as it is, but as it *appears* to a reasonable person.<sup>163</sup>

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158. *E.g.*, Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 2 (2010), *available at* <http://courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf> ("Recusal is generally required . . . 'in a proceeding in which the judge's impartiality might reasonably be questioned.'").

159. *See, e.g.*, Carolyn Elefant, *The "Power" of Social Media: Legal Issues & Best Practices for Utilities Engaging Social Media*, 32 ENERGY L.J. 1, 55 (2011) (acknowledging "[s]ocial media is here to stay").

160. *See generally id.* at 53 (defining social media as a rapidly changing medium where companies must continuously evolve by introducing versions and features). *But see* Matt Rosoff, *Facebook Is Losing Users in the Countries Where It Took Off First*, BUS. INSIDER (June 14, 2011), *available at* [http://articles.businessinsider.com/2011-06-13/tech/30013526\\_1\\_facebook-first-users-countries](http://articles.businessinsider.com/2011-06-13/tech/30013526_1_facebook-first-users-countries) (indicating declines in Facebook membership in the United States).

161. *Cf.* Keith R. Fisher, *Education for Judicial Aspirants*, 43 AKRON L. REV. 163, 185–89 (2010) (describing a decline of public confidence in the judiciary in part because of the far removed position of the judiciary).

162. *See* Herbert B. Dixon Jr., *The Black Hole Effect: When Internet Use and Judicial Ethics Collide*, JUDGES' J., Fall 2010, at 38, 38 (comparing the Internet and its communication methods to a black hole effect because of the trouble judges may find themselves in when using it).

163. *See, e.g.*, Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 3–5 (2010) (acknowledging that meeting ethical rules requires judges to avoid behavior that would otherwise be

Because the canons are imprecise and subject to fact-based applications post hoc, judges must use extraordinary caution and judgment before participating in an online community.

While a path that strikes a reasonable balance between draconian restrictions and lax guidelines is the aspirational goal, the law is only slowly establishing that path.<sup>164</sup> The earliest forays by judicial ethics committees have merely identified the risks associated with SNS use by judges.<sup>165</sup> The next step is for state judicial committees to draft guidance that incorporate the reality of a judiciary that is fully engaged in the Social Media Age.

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acceptable for the general public).

164. See Steven Lubet, *Judicial Ethics and Private Lives*, 79 NW. U. L. REV. 983, 1007–08 (1984) (concluding that it is necessary to balance restrictions for judges against “judges’ legitimate rights to privacy, self-expression, and freedom of association”).

165. See Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119, at 3–5 (2010) (cautioning that posting pictures or commentary could be inappropriate for judges); N.Y. State Advisory Comm. on Judicial Ethics, Op. 08-176, para. 11 (2009), *available at* <http://www.courts.state.ny.us/ip/judicialethics/opinions/08-176.htm> (warning that “other users of the social network, upon learning of the judge’s identity, may informally ask the judge questions about or seek to discuss their cases, or seek legal advice”); Ohio Bd. of Comm’rs on Grievances and Discipline, Op. 2010-7, at 3 (2010), *available at* [http://www.sconet.state.oh.us/Boards/BOC/Advisory\\_Opinions/2010/default.asp](http://www.sconet.state.oh.us/Boards/BOC/Advisory_Opinions/2010/default.asp) (follow “Opinion 2010-7” hyperlink; then accept the download prompt) (reminding judges of the difficulty involved in meeting ethical requirements when involved in SNSs).

